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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

March 14, 1996

EX PARTE

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CC Docket 92-237


In the Matter Rulemaking to Amend Part 1, 2,
21, and 25 of the Commission's Rules to
Redesignate the 27.5 - 29.5 GHz Frequency Band
to Reallocate the 29.5 - 30.0 GHz Frequency Band
to Establish Rules and Policies for Local Multipoint
Distribution Service and for Fixed Satellite Services.

Dear Mr. Caton:

Jason Priest of ComTech Associates, Inc., and Kevin McGilly of Freedom Technologies, Inc. (on behalf of ComTech) met today with Rudy Baca of Commissioner James H. Quello's office to discuss matters relating to the above captioned proceeding. We advocated the positions expressed by ComTech in its comments, reply comments, and in the attached *ex parte* letters submitted to the Commission earlier this week.

ADVANCED IDEAS
IN COMMUNICATIONS

Sincerely,


Kevin McGilly

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Suite 650 East
Washington, D.C. 20005

(202) 371-2220
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Attachments

cc: Rudy Baca

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ComTech

A S S O C I A T E S

March 14, 1996

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Acting Secretary
Federal Communications Commission
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Re: CC Docket No. 92-297

In the Matter of Rulemaking to Amend Part 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band to Reallocate the 29.5 - 30.0 GHz Frequency Band to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services.

Dear Mr. Caton:

ComTech Associates Incorporated ("ComTech") hereby submits an original and five copies of the following ex parte comments on the Third Notice and Proposed Rulemaking in the above-captioned proceeding ("Third Notice"). ComTech, a prospective Local Multipoint Distribution Service ("LMDS") provider based in Irving, Texas, wishes to supplement the record in this proceeding with respect to band plan issues that are of critical importance to the future success of the LMDS industry.

As we indicated in our August, 1995 Comments in the Third NPRM, ComTech is supportive of a quick resolution to the 28 GHz rulemaking. Now, some seven months later, it is apparent in retrospect that rapid closure was not to be. However, there is an opportunity now to finalize the 28 GHz band plan in a manner accommodating all interests. ComTech supports closure now--to facilitate the speedy licensing and deployment of LMDS as well as the GSO/FSS, NGSO/FSS and MSS services which will share the 28 GHz band.

Specifically, ComTech supports the band plan referred to as "Option 4 Prime" (Option 4'), and is categorically opposed to "Option 5," which would condemn LMDS to a non-competitive status in the multi-service broadband access market. While the total bandwidth allocated to LMDS under Option 4' is only 985 MHz and not the full 1000 MHz that we have previously supported, we believe the tradeoff of 15 MHz for rapid closure in the 28 GHz proceeding is a prudent one given the negative consequences of

further delay in creating return on the capital at risk in our small business. The fact that we support an option that provides LMDS with less spectrum (985 MHz under Option 4') than the alternative (1000 MHz under Option 5) is telling -- Option 5 is not workable for LMDS.

With regard to Option 4', we offer the following observations:

- Option 4' provides a natural band split for outbound (hub-to-subscriber) and return (subscriber-to-hub) links. The 850 / 135 MHz split is consistent with ComTech service provisioning plans for multi-service LMDS.
- Although ComTech is not an LMDS supplier, our current understanding of equipment configurations indicates that this option will require minimal modification to existing LMDS antenna/downconverter designs that anticipate or accommodate a transmitter to facilitate two-way service by return links. This attribute of Option 4' is extremely attractive and necessary because it allows implementation of a full-service LMDS platform while minimizing technology risk.
- The Option 4' LMDS service rules governing the 135 MHz should be consistent with those supported by LMDS proponents in late 1995 for return links in the (then) 150 MHz to be shared with MSS feeder links (maximum +20 dBW/MHz EIRP and the associated Texas Instruments' proposed mask for off-boresight angles). We note that the combination of the peak EIRP and antenna mask should be replaced by a single "EIRP mask" to maximize flexibility in trading off peak power and the antenna pattern.
- The zone within which LMDS should be required to accept interference from MSS Feeder Link earth stations should be no larger than that proposed by the Commission in the Third NPRM (75 nautical mile radius), and preferably should be limited to a 40 kilometer radius in accordance with more recent and reasonable estimates of interference potential.
- The GSO/FSS operations in the 135 MHz to be shared with LMDS and MSS Feeder Uplinks should be limited to "GSO/FSS Gateways." Further, these proposed "Gateways" should be restricted to secondary status. The adoption of rules to allow Gateway operation within certain areas defined by population density is extremely risky. For example, ComTech envisions LMDS service in small towns which may be significantly displaced from other population centers such that the population density of these LMDS service areas, when averaged with their immediate surroundings, may appear artificially low. Additionally, any population density criterion would become generally untenable given real population distributions--which do not follow smooth gradients from high to low density. If the GSO/FSS Gateways are truly intended for low-density areas, there should be no problem placing them in intended areas on a secondary basis--there will be no LMDS there to interfere with.

Option 5 is Unacceptable for the following reasons:

- The ability to cost-effectively provide two-way services with a viable bandwidth split between outbound and return links is precluded by the Option 5 band split which consists of three non-contiguous subbands for LMDS.
- Due to proposed prohibition of return links in the upper 150 MHz of the LMDS spectrum in Option 5 (29.1 - 29.25 GHz), the return links would be forced to the "middle" 150 MHz (28.45 - 28.6 GHz). This creates a filtering and signal processing problem that virtually every potential supplier to ComTech has characterized as fatal. The complexity of these functions in a subscriber downconverter to accommodate the Option 5 frequency plan is beyond mass-producible, consumer-cost solutions. Equally grave is the projection that any solution would render the top 150 MHz nearly useless--effectively cutting the LMDS allocation to a total of 850 MHz from 1000 MHz.
- The operation of return links in spectrum interleaved with spectrum for outbound services is inherently difficult. This is precisely why 800 MHz cellular allocations are based on duplex splits between base-to-mobile and mobile-to-base subbands. This is also precisely why satellite the uplink spectrum is paired with companion downlink spectrum -- 10,000 MHz away in the 18 GHz band.
- ComTech is familiar with satellite operations based on its involvement in satellite-based services. We completely disagree with any claim that the costs of operating satellite services over non-contiguous spectrum are similar to the costs of operating LMDS over non-contiguous spectrum. Not only are such representations untrue, it is also impossible to make a blanket statement about all non-contiguous plans--as noted above, Option 4' involves non-contiguous LMDS spectrum, but it does not embody the negative attributes of Option 5.
- GSO/FSS downlink receivers will be operated at 18 GHz--away from LMDS and in a band where design is easier than in the 28 GHz band. These GSO/FSS subscriber receivers will be exposed to out-of-band interference from sources which are in GSO. In contrast, under Option 5, LMDS will be exposed directly to "interference" from its own return link transmitters which are co-located with its receivers for outbound transmissions from the hub. There is no similarity between the interference scenario geometries for LMDS and GSO/FSS under Option 5.
- Option 5 allows for the full 1000 MHz for GSO/FSS in the 28 GHz band, while Option 4' expands this to 1010 MHz. Furthermore, in reality under either Option, GSO/FSS has companion downlink spectrum which at least doubles its allocation -- to over 2000 MHz total. Option 4' is better than Option 5 for both LMDS and GSO/FSS.

Summary

ComTech supports the Commission's efforts in this proceeding to accommodate all parties interested in the 28 GHz band. However, LMDS has been ready for deployment in

the U.S and is poised for deployment internationally where governments have recognized LMDS as a viable competitor to entrenched monopoly service providers. Where the benefits of a speedy resolution to this proceeding will accrue to consumers and entrepreneurs alike, we urge the Commission to end this lengthy proceeding by immediately finalizing a band plan acceptable to LMDS proponents and to hold auctions that will set free a vital national resource. The Commission could endlessly entertain supposed "improvements" to band plans and by doing so accommodate intentional delay tactics on the part of parties who expect a free ride from the American taxpayer. It is so clearly in the public interest, and the record in this proceeding, that LMDS deserves the spectrum allocation contemplated in the Third Notice or Option 4' that we urge the Commission to resolve this matter as quickly as possible.

Sincerely,

A handwritten signature in black ink, appearing to read 'JP' followed by a stylized flourish.

Jason Priest
V.P. of Finance

cc: Blair Levin
Ruth Milkman
Jackie Chorney
Lauren J. Belvin
Rudolfo M. Baca
Lisa B. Smith
Brian Carter
Jane Mago
Suzanne Toller
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David Wye
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Thomas Tycz
Harry Ng
Karl Kensinger
Jennifer Gilsenan
Michael J. Marcus



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Re: CC Docket No. 92-297

In the Matter of Rulemaking to Amend Part 1, 2, 21, and 25 of the
Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band
to Reallocate the 29.5 - 30.0 GHz Frequency Band to Establish Rules and
Policies for Local Multipoint Distribution Service and for Fixed Satellite
Services

Dear Mr. Caton:

ComTech Associates Incorporated ("ComTech") hereby submits an original and five copies of the following ex parte comments on the Third Notice and Proposed Rulemaking in the above-captioned proceeding ("Third Notice"). ComTech, a prospective Local Multipoint Distribution Service ("LMDS") provider based in Irving, Texas, wishes to supplement the record in this proceeding with respect to three issues of critical importance to the future success of the LMDS industry:

1. The need for FCC preemption of state and local zoning ordinances affecting the installation and maintenance of LMDS transmit and receive devices on subscriber premises;
2. The appropriate regulatory treatment of LMDS operators, to the extent that they may be classified as common carriers for the provision of telecommunications services; and
3. The exemption of LMDS systems from regulation as cable systems, and hence from local cable franchising obligations.

While ComTech previously has filed initial and reply comments in this proceeding, the legal and regulatory considerations affecting each of these issues have been altered considerably by enactment of the Telecommunications Act of 1996 ("The Telecom Act"). For the reasons discussed below, ComTech believes that it is imperative that the Commission address these issues in its pending order on the Third Notice.

1. Preemption of Local Zoning Ordinances that Restricting the Placement and Operation of LMDS Transmit and Receive Devices.

LMDS holds tremendous potential to serve as a principal source of competition not only to current monopoly and dominant video programming distributors, but also to monopoly local exchange carriers. Indeed, ComTech believes that telecommunications services, including local exchange and exchange access services, may emerge as significant, if not the primary, offerings of LMDS operators. Given the strong commitment of Congress and the Commission to fostering competition in both the local exchange and the video programming distribution market, ComTech respectfully urges the Commission to address in the pending LMDS order all potential unwarranted barriers to the successful implementation of LMDS.

One potential barrier, local zoning regulations that restrict the use of LMDS receive and transmit antennas on subscriber premises, has received scant attention in this proceeding. Yet ComTech believes that unless the Commission acts to preempt unwarranted zoning restrictions affecting LMDS devices, its pro-competitive goals in establishing the LMDS service will be thwarted.

Specifically, ComTech is concerned that, absent Commission action in this proceeding, LMDS transmit and receive devices may "slip through the cracks" of the Commission's existing and pending preemption rules, despite the near-identical interests involved. At its February 29, 1996, open meeting, the Commission, acting in IB Docket 95-59, revised its existing rules preempting local regulations restricting the use of satellite receive-only antennas and satellite transmit antennas.¹ The Commission also proposed to use the same preemption standard as a basis for implementing Section 207 of the Telecom Act, which directs the Commission to adopt rules preempting local and state regulations that "impair a viewer's ability to receive video programming services" through direct broadcast satellite (DBS), multichannel multipoint distribution services (MMDS), and "devices designed for over-the-air reception of TV broadcast signals."² The Commission further proposed to extend the preemption to private covenants that impose unreasonable restrictions on the use of antennas.

While the text of the Commission's rulemaking notice on implementing Section 207 has not yet been released, ComTech is concerned that the scope of the proposed preemption may not be sufficiently broad to encompass LMDS transmit and receive devices. ComTech intends to use antennas on subscriber premises both for over-the-air reception of broadcast signals and as transmit devices used to transmit telecommunications signals. ComTech submits that the same public interest considerations that motivated the Commission to preempt zoning regulations affecting satellite antennas and Congress to enact Section 207 apply to LMDS transmit and receive devices. Nonetheless, given the

¹ *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, *Action in Docket Case* (News Release issued Feb. 29, 1996).

² *Telecommunications Act of 1996*, Pub. Law 104-104, Section 207.

very tight regulatory implementation schedules imposed by the Telecom Act, ComTech is concerned that the Commission may decide to limit the scope of the Section 207 implementation proceeding to DBS, MMDS, and other TV reception devices.

Accordingly, ComTech believes that the CC Docket 92-297 LMDS proceeding is the appropriate venue in which to adopt a preemption standard for LMDS transmit and receive devices. ComTech urges the Commission to base the preemption standard on the new rules for satellite antennas, in particular the rule under which a local ordinance is presumptively unreasonable if it restricts the installation and maintenance of an antenna of one meter or less in all areas.³ Further, the preemption should apply equally to LMDS transmit and receive antennas and should extend to private covenants. In this regard, ComTech notes that Congress, in section 704 of the Telecom Act, expressed its clear intent to prohibit local governments from blocking the placement of antennas on the basis of the "environmental effects of radio frequency emissions."⁴

The Commission's statutory authority to adopt such a preemption standard is clear, and has been fully enunciated by the Commission in the IB Docket 95-59 proceeding.⁵ Congressional intent with regard to such preemption is also clear in Sections 207, 704, and 253(a) of the Telecom Act.⁶ Having directly solicited comment on preemption issues in the Third Notice,⁷ the Commission has the authority to act on the issue in this proceeding.

2. The Telecom Act Permits the FCC to Forbear from Imposing Common Carrier Obligations on LMDS Providers.

In the Third Notice, the Commission stated that it had "no alternative but to impose all statutory requirements pertaining to common carriers" on LMDS operators, to the extent that they provide telecommunications services on a common carrier basis.⁸ Congress, however, has since given the Commission an alternative.

Under Section 401 of the Telecom Act, a new section (Section 10) is added to the Communications Act of 1934. Subparagraph (a) specifically requires, the FCC, inter alia,

³LMDS antennas on subscriber premises are expected in most or all instances to be less than eighteen inches in size.

⁴*Telecommunications Act of 1996*, Pub. Law 104-104, Section 704.

⁵*See, e.g., Preemption of Local Zoning Regulation of Satellite Earth Stations*, 10 FCC Rcd 6982 (1995).

⁶Section 253(a) states that "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services." *Telecommunications Act of 1996*, Pub. Law 104-104, Section 253(a).

⁷*Third Notice* at para. 112.

⁸*Third Notice* at para. 109.

to forbear from applying any regulation to a telecommunications service "if the Commission determines that--

"(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

"(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

"(3) forbearance from applying such provision or regulation is consistent with the public interest."⁹

The Commission is also required to look at the competitive effects of forbearance, including whether forbearance promote competition among telecommunications service providers. If the Commission finds that forbearance will promote competition, then such forbearance will be in the public interest.

Clearly the Commission can and should forbear from regulating LMDS common carrier services, including the requirement that LMDS operators file tariffs. First, LMDS will be competing with incumbent telephone and cable services. LMDS providers will be entering the market with zero market share. LMDS will be the second, and in some cases, the third, fourth or fifth service provider. Enforcement of common carrier regulations for LMDS is not necessary to ensure that charges, practices, classifications, or regulations are just and reasonable. If such charges, practices, classifications, or regulations are unjust and unreasonable, consumers will not subscribe to the service.

Second, enforcement of such regulations is not necessary to protect consumers. As noted above, LMDS will be a competitive service, not a monopoly service. With consumer choice, regulation of new entrants is not necessary to protect consumers. Subjecting LMDS to such regulations will more likely delay the onset of competition for these services, deferring the consumer benefits of competition.

Finally, forbearance of LMDS regulation is in the public interest. New entrants into a market already face many hurdles in establishing a customer base against an incumbent provider. Forbearance from common carrier regulations will allow LMDS providers to enter the market sooner, and will allow LMDS providers to provide service more efficiently. The end result will be more competition and faster competition. Subsection 10(b) states that a Commission finding that forbearance promotes competition means that such forbearance is in the public interest.

Having met all the statutory requirements of new section 10, the Commission may forbear from common carrier regulation of LMDS.

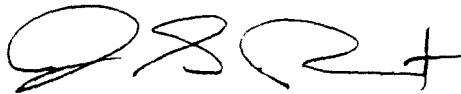
⁹While section 10(c) does allow a telecommunications carrier to petition the Commission for forbearance, there is no prohibition against the Commission forbearing sua sponte.

3. The Telecommunications Act of 1996 Clarifies that an LMDS System is not Cable System.

The Third Notice tentatively concludes that an LMDS system, because it is a wireless service, is not a cable system.¹⁰ Section 301(a)(2) of the Act modifies the definition of cable system to state specifically that "The term 'cable system'... does not include...(B) a facility that serves subscribers without using any public right-of-way." This change in the cable system definition makes it clear that an LMDS system, which does not use any public rights-of-way, is not a cable system and therefore should not subject to cable regulations.

As noted above, the Third Notice also seeks comments regarding preemption issues. Because an LMDS system should not be classified as a cable system, an LMDS system should also not be subject to the franchise requirements of Sections 621 et seq. of the Communications Act of 1934. The Commission should explicitly preempt state and local authorities from imposing franchise obligations on LMDS systems.

Sincerely,



Jason Priest
V.P. of Finance

cc: Blair Levin
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Susan Magnotti
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¹⁰Third Notice at para. 100.

Scott Blake Harris
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